Supreme Court, U.S.
FILED

(1) No. 03-180 JUL 24 2003

OFFICE OF THE CLERK

In The Supreme Court of the United States

FRANCES BROADDUS CRUTCHFIELD

and

HENRY RUFFIN BROADDUS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS

and

COUNTY OF HANOVER, VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for Writ of Certiorari

William B. Ellis
1406 Confederate Avenue
Richmond, Virginia 23227
(804) 355-4043

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

19 pp

QUESTION PRESENTED

Whether a court, having previously set aside an administrative determination as arbitrary and unreasonable, may apply "heightened scrutiny" when reviewing the agency's decision reaching the same result following remand?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

Petitioners: Frances Broaddus Crutchfield, an individual, and her son, Henry Ruffin Broaddus, an individual.

Respondents: United States Army Corps of Engineers, an agency of the United States of America, and the County of Hanover, Virginia, a local government within the Commonwealth of Virginia.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE PETITION 10

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER "HEIGHTENED SCRUTINY" OF ADMINISTRATIVE ACTION FOLLOWING REMAND IS APPROPRIATE AND PERMISSIBLE 10

II. WHETHER "HEIGHTENED SCRUTINY" IS APPROPRIATE AND PERMISSIBLE IS AN IMPORTANT QUESTION ARISING UNDER THE ADMINISTRATIVE PROCEDURE ACT . 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd Cir. 1983) 12

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 13

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 13

City of Los Angeles v. U.S. Dept. of Transportation, 165 F.3d 972 (D.C. Cir. 1999) 11

Crutchfield v. U.S. Army Corps of Engineers, 154 F. Supp. 2d 878 (E.D. Va. 2001) 1, 4, 5

Crutchfield v. U.S. Army Corps of Engineers, 214 F. Supp. 2d 593 (E.D. Va. 2002) 2, 7, 8, 9

Crutchfield v. County of Hanover, 325 F.3d 211 (4th Cir., March 27, 2003) 2, 5, 8, 9

Dow Chemical Co. v. U.S. Environmental Protection Agency, 605 F.2d 673 (3rd Cir. 1979) 12

Food Marketing Institute v. ICC, 587 F.2d 1285 (D.C. Cir. 1978)) 11

Greyhound Corp. v. Interstate Commerce Comm'n, 668 F.2d 1354 (D.C. Cir. 1981) 11

Maggard v. O'Connell, 671 F.2d 568 (D.C. Cir. 1982) .. 11

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 13

Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) 11, 12

Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984) 12

STATUTES

Administrative Procedure Act

5 U.S.C. § 706(2) 2, 13

Clean Water Act

Generally, 33 U.S.C. §§ 1251, *et seq.* 5

Section 404, 33 U.S.C. § 1344 ..... 1, 3

Judicial Code and Judiciary

28 U.S.C. § 1254(1) 2

REGULATORY MATERIALS

Department of Defense, Corps of Engineers

Permit Rules:

33 C.F.R. § 320 (2002) 4

Nationwide Permit Rules:

33 C.F.R. § 330 (2002) 1

33 C.F.R. § 330.1 (2002) 3

33 C.F.R. § 330.4 (2002) 3

33 C.F.R. § 330.6 (2002) 3, 6, 7

56 Fed. Reg. 59,110, 59,117 (Nov. 22, 1991) 6

The Nationwide Permits:

65 Fed. Reg. 12,818, 12,898 (Mar. 9, 2000) 6

67 Fed. Reg. 2020 (Jan. 15, 2002) 1, 3, 4, 6

Environmental Protection Agency

Section 404(b)(1) Guidelines

40 C.F.R. § 230.10 ..... 3, 4

OPINIONS BELOW

This case concerns a second determination by the United States Army Corps of Engineers ("the Corps") that certain discharges of fill material proposed by the County of Hanover, Virginia ("the County") are authorized by various general "nationwide permits" issued by the Corps by regulation pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. *See generally*, 33 C.F.R. § 330 (2002) (the Corps' nationwide permit rules); 67 Fed. Reg. 2020 (Jan. 15, 2002) (the nationwide permits themselves). The discharges proposed by the County are associated with construction of a planned sewage treatment project.

The Corps first determined that discharges associated with the project were authorized by nationwide permits on June 7, 2000. That action was set aside by the United States District Court for the Eastern District of Virginia on August 14, 2001. *Crutchfield v. U.S. Army Corps of Engineers*, 154 F. Supp. 2d 878 (E.D. Va. 2001) ("*Crutchfield I*"), Appendix at 260A. The district court found that the Corps' use of the summary "nationwide permit" process was "remarkably illogical" and a "belated contrivance of expediency" designed to avoid more stringent regulatory scrutiny of the project. *Id.* at 897-98, Appendix at 294A-298A. The United States Court of Appeals for the Fourth Circuit dismissed the Corps' and the County's appeal from the district court's original decision on May 31, 2002.

On remand, and despite assurances by the Corps to the district court and the parties that it would apply the more stringent criteria of the individual permit process to the County's project, the Corps again authorized the discharges associated with the County's proposal on the grounds that they were covered by nationwide permits. *See* Memorandum

for the Record, Appendix at 152A. The district court, after reviewing the Corps' action on remand in light of its prior conduct, giving "heightened scrutiny" to the administrative record, set aside the Corps' action for a second time on August 7, 2002. *Crutchfield v. U.S. Army Corps of Engineers*, 214 F. Supp. 2d 593 (E.D. Va. 2002) ("*Crutchfield II*"), Appendix at 27A.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed. *Crutchfield v. County of Hanover*, 325 F.3d 211 (4th Cir., March 27, 2003), Appendix at 1A. The panel determined that the prior administrative history was irrelevant and that the district court was not permitted to apply "heightened scrutiny" to the Corps' action reaching the same result following remand.

JURISDICTION

The Fourth Circuit filed its decision on March 27, 2003, and entered an order denying petitioner's motion for rehearing on April 25, 2002. Appendix at 256A. This Court has jurisdiction to review the circuit court's decision on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

5 U.S.C. § 706(2)

The Administrative Procedure Act requires federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Appendix at 259A.

STATEMENT OF FACTS

Petitioners brought this and a prior case to challenge use by the Corps of a summary permit procedure (called "Nationwide Permits" or "NWPs") to authorize discharges of fill associated with construction of the County's proposed Totopotomoy Sewage Treatment Plant. NWPs are general permits issued by regulation and are intended to apply only to projects with minimal environmental effects. 33 C.F.R. § 330.1 (b) and (c) (2002). If a project involves discharges of dredged or fill material to one-half acre of wetlands or more, then the Corps' rules require use of a full, individual permit process rather than NWPs. 67 Fed. Reg. 2020, 2085 (NWP 39 is subject to one-half acre maximum), 2092 (Condition 15, restricting impacts when multiple NWPs are used). If a project is eligible for NWPs, the applicant need not perform an evaluation of off-site alternatives (*i.e.*, alternatives at other locations), nor demonstrate that it is the least environmentally damaging of those alternatives. 33 C.F.R. § 330.4, 330.6 (2002). If a project requires an individual permit, then the applicant must perform such an evaluation and make such a demonstration to obtain a permit.[1]

---

[1] To obtain an individual permit, a project must comply with regulations published by the Environmental Protection Agency ("EPA"). *See* Clean Water Act § 404(b)(1), 33 U.S.C. § 1344(b)(1). Those regulations require the applicant to demonstrate that no less environmentally-damaging alternative to the project is available. 40 C.F.R. § 230.10 (2002). The applicant must also overcome a regulatory presumption that less environmentally damaging alternatives exist to discharging fill material into wetlands in the case of projects that do not

Before one may use and rely upon certain NWPs (including NWP 39 which is at issue in this case), one must provide the Corps with "pre-construction notification" of the proposed discharges and obtain verification from the Corps that they qualify for the NWPs. The Corps' verification may either be express and in writing (as occurred in this case), or it may be inferred by the passage of forty-five days without objection from the Corps. *See, e.g.*, 67 Fed. Reg. 2020, 2085, 2090 (Jan. 15, 2002) (regarding NWP 39 and Condition 13).

On June 7, 2000, the Corps determined that the County's project qualified for three NWPs, authorizing the County to discharge dredged or fill material during construction of the proposed sewage treatment plant, a discharge forcemain that would convey treated sewage away from that plant, and an outfall structure and diffuser that would discharge the treated effluent into the Pamunkey River. *Crutchfield I*, 154 F. Supp. 2d at 891, Appendix at 283A. Although additional, much more extensive discharges of dredged or fill material were also contemplated by the County in association with construction of facilities to convey raw sewage to the proposed plant for treatment

---

require proximity to water. 40 C.F.R. § 230.10(a)(3) (2002). The applicant must rigorously evaluate all reasonable alternatives, including not engaging in the proposed activity at all ("no action alternative"), 40 C.F.R. § 230.10(a)(1)(i) (2002), and engaging in alternate activities in different locations ("off site alternatives"), 40 C.F.R. § 230.10(a)(1)(ii) (2002). Finally, the project must satisfy other environmental criteria such as not causing or contributing to the violation of water quality standards, 40 C.F.R. § 230.10(b); 33 C.F.R. § 320.4 (2002).

(called the Totopotomoy Creek Interceptor Sewer, or "TC Interceptor"), those discharges were not included by the County in its NWP verification request. If considered part of the same project, those discharges would have caused the total wetland impacts of the project greatly to exceed one-half acre, and therefore would have compelled an individual permit review process. The Corps determined that the treatment plant, discharge forcemain, and outfall structure and diffuser were a separate and complete project, which had "independent utility" apart from any means of conveying raw sewage to the plant for treatment.

Petitioners brought an action against the Corps and the County on August 8, 2000, seeking to invalidate the NWP verifications. Their purpose was to obtain an individual permit review of the County's proposal, including the required assessment of potential off-site alternatives. *See generally, Crutchfield I*, Appendix at 260A. On August 14, 2001, the district court found that the Corps' determination was arbitrary and capricious. The NWP verifications therefore were set aside as contrary to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* *See Crutchfield I*, 154 F. Supp. 2d at 903, Appendix at 307A. The County's appeal from the district court's decision was dismissed by the Fourth Circuit on May 31, 2002. *Crutchfield et al. v. County of Hanover, Virginia*, Record No. 01-2488 (4th Cir., filed May 31, 2002).

Following the district court's decision and while its appeal in the Fourth Circuit was pending, the County filed a new individual permit application with the Corps on November 16, 2001. This time, the County included in its application a means for delivering some sewage to the proposed sewage treatment plant (through a facility known as the Lee Davis Road Pump Station and Forcemain).

The Lee Davis Road Pump Station and Forcemain was not contained in the County's previous application to the Corps, nor was it contained in any of the County's wastewater facilities planning documents. Further, none of the means for delivering wastewater to the proposed treatment plant that were included in the County's wastewater facilities planning documents were included in the new individual permit application.

Petitioners filed timely comments with the Corps objecting to the issuance of the permit. Among other objections, those comments contended that the Lee Davis Road Pump Station and Forcemain was a pretext and a sham that could not accomplish either the short- or long-term goals previously stated by the County. Petitioners argued it was designed to obtain expeditious authorization from the Corps so the County could proceed to construct the sewage treatment plant, but was not the "complete" project which applicants are required to disclose and permit. 33 C.F.R. § 330.6(c) (2002).

To be "complete," the activities proposed must by themselves have "independent utility." 56 Fed. Reg. 59,110, 59,117 (Nov. 22, 1991). According to the Corps, the dispositive factor in deciding if a set of activities has "independent utility" is whether the project as proposed "*would be constructed absent the construction of other projects in the project area.*" 67 Fed. Reg. 2020-01, 2094 (Jan. 15, 2002) (emphasis added); *see also* 65 Fed. Reg. 12,818, 12,898 (Mar. 9, 2000). In other words, the proposed activities must be *"fully justified"* even if the Corps were not to approve any other activities. 33 C.F.R. § 330.6(d) (2002) (emphasis added).

Petitioners contended that if the Corps were to consider the other facilities the record suggested actually were planned by the County to deliver wastewater to the sewage treatment plant -- one of which was already under construction for the County by a developer -- the impacts of the overall project would exceed the threshold of one-half acre of wetlands and would require use of the individual permit process. That, in turn, would require the County to evaluate off-site alternatives to its project and to demonstrate its proposal was least environmentally-damaging alternative before it could obtain a permit. Petitioners contended that no such demonstration had been, or could be, made.

Notwithstanding the petitioners' comments, and despite assurances given by the Corps to the district court and the parties that it would use the individual permit process to evaluate the County's project, on April 4, 2002, the Corps announced its decision once again to verify application of NWPs to the project and to terminate the individual permit process. Appendix at 152A.

On April 19, 2002, petitioners filed this action, alleging that the Corps' verification of NWPs for the project was improper because the Corps did not articulate a rational basis for concluding that the project, as proposed, constituted a single and complete project. *Crutchfield II*, 214 F. Supp. 2d at 602-03, Appendix at 38A. In subsequent briefing, the parties agreed that the dispositive question before the Corps was whether the project as proposed would be constructed absent the construction of other projects in the project area.

On August 7, 2002, the district court issued its decision, which included a detailed examination of the administrative record. It found that the Corps had completely failed to address the dispositive question.

Crutchfield II, 214 F. Supp.2d at 652, Appendix at 144A-146A. Because the Corps had failed to address the dispositive question, the district court found the record contained no articulated agency rationale to which it could defer. *See id.* at 652-53, Appendix at 145A-148A. Accordingly, it set aside the Corps' determination that the project was "complete."

The County filed a notice of appeal on August 20, 2002, and the Corps filed one on October 2, 2002. On March 27, 2003, a panel of the United States Court of Appeals for the Fourth Circuit reversed. *Crutchfield v. County of Hanover,* 325 F.3d 211, Appendix at 1A. The panel found the district court erred by applying "heightened scrutiny" to the administrative record:

> Despite acknowledging the governing caselaw, the district court in this case declined to accord the necessary deference to the Army Corps' decision. Noting that the Corps' initial decision had been overturned as arbitrary and capricious, the district court asserted that the Corps' review of the second project had reached "virtually the same decision after judicial remand." 214 F. Supp. 2d 593, 621 (citing *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 n. 23 (D.C.Cir. 1979)). It therefore decided that the Corps' most recent decision should be assessed under "heightened scrutiny" and proceeded to engage in a highly exacting, essentially de novo examination of the record, repeatedly rejecting the Corps' conclusions and drawing its own independent inferences from the evidence. *Id.*

> This was an erroneous approach that turned the Administrative Procedure Act on its head.[2]

The panel opinion notes that the Corps assigned new staff to the project and generated a voluminous record. However, it does not cite any evidence in that record of consideration by the Corps of the dispositive question: whether the County would in fact construct the project as proposed absent the construction of other means for conveying wastewater to the sewage treatment plant.

---

[2] *Crutchfield v. County of Hanover*, 325 F.3d at 218, Appendix at 12A. The district court in fact did not draw its own independent inferences from the evidence. The court determined only that the Corps had failed to address the evidence before it in a meaningful way and had failed to explain the reasons underlying its determinations. *Crutchfield II*, 214 F. Supp. 2d at 652-53, Appendix at 145A-149A.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER "HEIGHTENED SCRUTINY" OF ADMINISTRATIVE ACTION FOLLOWING REMAND IS APPROPRIATE AND PERMISSIBLE.

With this decision, the United States Circuit Courts of Appeals are in conflict as to whether "heightened scrutiny" of administrative action following remand is appropriate and permissible under the Administrative Procedure Act.

The District of Columbia Circuit has determined that "heightened scrutiny" can be appropriate and is permitted.

> More exacting scrutiny will be particularly useful when for some reason the presumption of agency regularity, *see Citizens to Preserve Overton Park, supra*, 401 U.S. at 415, 91 S.Ct. 814, is rebutted, as where the agency has demonstrated undue bias towards particular private interests, *see, e.g., Central Florida Enterprises, Inc. v. FCC*, 194 U.S.App.D.C. 118, 598 F.2d 37 (1978); where the agency has had a history of "ad hoc and inconsistent judgments" on a particular question, *Local 777 v. NLRB*, 195 U.S.App.D.C. 280 at 287-289, 603 F.2d 862 at 869-871 (1978); where the agency has arrived at an identical result after remand from a reviewing court for further explanation of reasons, *e.g., Food Marketing Inst. v. ICC*, 190 U.S.App.D.C.

> 388, 392-93, 587 F.2d 1285, 1289-90 (1978); *accord, Citizens to Preserve Overton Park, supra*, 401 U.S. at 420, 91 S.Ct. 814; or when an agency has departed from its consistent and longstanding precedents or policies, *see Office of Communication of United Church of Christ v. CAB*, 191 U.S.App.D.C. 360 at 366-367, 590 F.2d 1062 at 1068-1069 (1978); *International Union v. NLRB*, 148 U.S.App.D.C. 305, 317-18, 459 F.2d 1329, 1341-42 (1972).

Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1049 n. 23 (D.C. Cir. 1979). *See also, Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982) (Judicial review must be "contextually tailored" and courts may apply "more exacting scrutiny" or "greater care" when "danger signals" suggest an agency may not really have taken a "hard look" at the salient problems) and *Greyhound Corp. v. Interstate Commerce Comm'n*, 668 F.2d 1354, 1358 (D.C. Cir. 1981) ("A reviewing court . . . will accord a somewhat greater degree of scrutiny to an order that arrives at substantially the same conclusion as an order previously remanded by the same court," *citing Food Marketing Institute v. ICC*, 587 F.2d 1285, 1289-90 (D.C. Cir. 1978)).[3]

---

[3] *But c.f. City of Los Angeles v. U.S. Dept. of Transportation*, 165 F.3d 972, 977-78 (D.C. Cir. 1999) ("The City submits that our review should be more strict given that the Department arrived at the same result on remand as it had reached in its initial decision, but that proposition strikes us as flatly inconsistent with the *Chenery* doctrine. *See SEC v. Chenery Corp. (Cheney I)*, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454 (1943); *SEC v. Chenery Corp. (Chenery II)*, 332

The Ninth Circuit also has determined that heightened scrutiny of agency action can be appropriate.

> More exacting scrutiny [of agency action is] particularly useful when for some reason the presumption of agency regularity . . . is rebutted.

Preston v. Heckler, 734 F.2d 1359, 1372 (9th Cir. 1984) (quoting *Natural Res. Def. Council, Inc. v. SEC*, *supra*.).

The Third Circuit also appears to follow this rule.

> [T]he scope of judicial review [of agency action under the arbitrary and capricious test] necessarily admits of some flexibility and the stringency of our inquiry will depend on, and often vary according to, the variety of factors presented by a particular case.

Cape May Greene, Inc. v. Warren, 698 F.2d 179, 190 (3rd Cir. 1983). *See also Dow Chemical Co. v. U.S. Environmental Protection Agency*, 605 F.2d 673, 681-82 (3rd Cir. 1979).

Thus the Fourth Circuit, in determining that "heightened scrutiny" of administrative action following remand is "an erroneous approach," is in conflict with other circuits that have considered this issue.

U.S. 194, 200, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947)").

Granting the writ of certiorari is appropriate in this case to assure uniformity among the Circuits in reviewing administrative actions.

II. WHETHER "HEIGHTENED SCRUTINY" IS APPROPRIATE AND PERMISSIBLE IS AN IMPORTANT QUESTION ARISING UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act requires federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The statute does not address the degree of deference to be accorded by the federal courts to administrative determinations.

This Court, of course, has addressed the general subject on many occasions. *See, e.g., Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). However, it has never determined whether the deference normally accorded to agency fact-finding may be reduced when an agency has previously acted arbitrarily or unreasonably with respect to a particular matter.

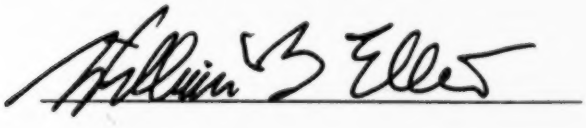
This case presents an important question of administrative law. Are the federal courts required to be endlessly credulous of agency findings and conclusions, as the Fourth Circuit decided? Or, may a reviewing court consider the agency's prior behavior in the same matter in

determining the appropriate degree of scrutiny to be given to the agency's fact-finding?

CONCLUSION

The Court should grant the petition for a writ of certiorari to resolve a conflict among the Courts of Appeals concerning an important question of federal administrative law.

Respectfully submitted,



WILLIAM B. ELLIS
Counsel of Record for Petitioner

1406 Confederate Avenue
Richmond, Virginia 23227
(804) 355-4043